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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 206

SERIES "A" TRUST, AN EXPRESS TRUST, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 28–35) is unreported. The opinion of the Court of Appeals (R. 78–81) is reported in 126 F. (2d) 530.

JURISDICTION

The judgment of the Court of Appeals was entered March 9, 1942 (R. 81). A petition for rehearing and modification of the opinion and judgment of the Court of Appeals was denied April 16, 1942, (R. 84). The petition for a writ of certiorari was

filed July 3, 1942. Jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the taxpayer trust during the years 1933 and 1934 was an association within the meaning of section 1111 (a) (2) of the Revenue Act of 1932 and section 801 (a) (2) of the Revenue Act of 1934, taxable as a corporation.

2. If so, whether the Board erred in denying taxpayer's motion—filed after the Board had promulgated its findings of fact and opinion upon the issues tried before it—for further hearing in order that taxpayer might introduce proof upon issues suggested by taxpayer's pleadings, and upon which the taxpayer might have but did not offer proof at the trial.

3. Whether the Court of Appeals erred in denying taxpayer's motion—filed after the Court of Appeals had entered its judgment—asking a rehearing in the Court of Appeals and modification of the court's opinion and judgment so as to secure a remand to the Board with directions to consider evidence as to whether taxpayer had filed capital stock tax returns and paid capital stock taxes for the years 1933 and 1934 *after* the Board promulgated its findings and opinion in this case, and if the filing of such returns should be proved then to redetermine taxpayer's excess profits tax liability for the years 1933 and 1934 by allowing tax-

payer a credit of 12½ percent of whatever 1933 and 1934 values taxpayer had thus belatedly declared for its stock.

STATUTES AND REGULATIONS INVOLVED

The same statutes and regulations are involved here as in the companion cases of *Second Carey Trust* v. *Helvering,* No. 135, and *Hare Trust* v. *Helvering,* No. 136. The provisions of the 1934 Act and regulations are set forth in the Appendix to our brief in the *Second Carey Trust* case. The corresponding provisions of the Revenue Act of 1932, applicable to the taxable year 1933, are for present purposes identical with the provisions of the 1934 act. In addition, the following statutory provisions are relevant in this case:

National Industrial Recovery Act, c. 90, 48 Stat. 195:

> SEC. 215. (a) For each year ending June 30 there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock.
>
> * * * * *
>
> (d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed to the collector for the district in which is located its principal place of busi-

ness or, if it has no principal place of business in the United States, then to the collector at Baltimore, Maryland. Such return shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulations prescribe. The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector before the expiration of the period for filing the return. * * * The Commissioner may extend the time for making the returns and paying the taxes imposed by this section, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extension shall be for more than sixty days.

* * * * *

(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section * * *.

* * * * *

SEC. 216. (a) There is hereby imposed upon the net income of every corporation, for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 215, an

> excess-profits tax equivalent to 5 per centum of such portion of its net income for such income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capital stock * * * as of the close of the preceding income-tax taxable year * * * determined as provided in section 215. The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.
>
> * * * * *

The corresponding provisions of the Revenue Act of 1934 (sections 701 and 702) are for present purposes the same as the foregoing provisions of the National Industrial Recovery Act.

STATEMENT

The relevant facts, including those found by the Board (R. 28–32), may be summarized as follows:

The organization, powers, and operations of the taxpayer.—In an agreement executed June 3, 1933, the Southwest Company, a so-called "Express Trust", by its five individual trustees, agreed to buy from the Jacob Oil Corporation an undivided interest of approximately 40 percent of the working interest in an oil and gas lease (known as the Sinopoulo lease) in Oklahoma City together with appurtenant equipment and the right to receive $25,000 payable out of 9⅛ percent of the working interest oil from another well (known as the Turner well) located on a nearby leasehold (Ex. 6, R. 74–77). The stipulated consideration for the

properties was $140,000, payable in installments (R. 29, 74, 75).

By a declaration of trust dated June 10, 1933, the Southwest Company and its trustees created the taxpayer, Series "A" Trust (Ex. 1, R. 57–64). This instrument recited the making of the contract with the Jacob Oil Corporation, the acquisition by Southwest Company of an oil and gas lease on 320 acres of land in Custer County, Oklahoma, and that the purpose and intent of the Southwest Company and its trustees had been to hold the contract and the properties, when conveyed to Southwest, in a separate trust apart from the other property of the Southwest Company and for the owners of the beneficial interest to be issued in the new trust (R. 57). The trust instrument (Ex. 1) provided, *inter alia,* that the trust should embrace not only the interest in the two Oklahoma City leases and the Custer County lease but all other property thereafter conveyed to the Series "A" Trust and that the trustee (Southwest Company) should, at its option, have the right to acquire and hold other property for the benefit of the trust subject to the terms of the trust instrument (R. 29, 58). The trustee was authorized "to hold, handle, operate and manage" the trust property (R. 59), all business to be transacted and documents and papers executed in the name of Series "A" Trust (R.29–30, 58). The trust capital was represented by 2,800 nonassessable units of beneficial interest, evidenced

by certificates which were transferable only on the books of the trust[1] (R. 30, 58, 59).

The parties are agreed that the other provisions of the trust instrument creating the taxpayer are similar to those of the trust instrument involved in *Second Carey Trust* v. *Helvering* (No. 135, October Term, 1942) and that the activities of the taxpayer (and its trustee) in 1933 and 1934 were similar to those of the taxpayer in the *Second Carey Trust* case (see Pet. 3). From time to time distributions were made to the holders of the certificates of interest from taxpayer's receipts from oil and gas and from the $25,000 oil payment (R. 31, 50).

The returns filed, the issues before the Board, and the petitions for rehearing.—Taxpayer filed its income tax returns for the years 1933 and 1934 as a trust on form 1040. It did not file capital stock tax returns. The income tax return for each year showed a loss. Among the deductions taken from gross income, on each return, was a deduction for distributions to certificate holders and a deduction for depletion, or for depletion and depreciation. The Commissioner determined a deficiency against the taxpayer for each year; treating it as an association taxable as a corporation, he disallowed the deductions for distributions to certificate holders upon the ground that they were dividends; and he

[1] The record does not disclose the price which taxpayer paid for its several properties, or the price at which it sold its certificates.

allowed percentage depletion for 1933 but no depletion or depreciation for 1934 (R. 31-32). The Commissioner computed the excess profits tax on the income as determined by him without any allowance of 12½ per cent of a declared value of taxpayer's capital stock (R. 32).

Taxpayer tried its case to the Board upon the issue whether it was an association taxable as a corporation or was a trust the distributable income of which was taxable to its beneficiaries (see R. 33). It offered no evidence to show that it was entitled to any depreciation, and the Board observed (R. 34) that there were no facts of record upon which it could determine depreciation. As the Commissioner had allowed taxpayer percentage depletion for 1933 (in the amount of 27½ percent of gross income) and taxpayer had offered no evidence to show error in that allowance, the Board upheld the Commissioner's determination on that point. The Board then allowed taxpayer percentage depletion for 1934 (R. 34). As taxpayer had not proved that it had filed a capital stock tax return or that it had declared a capital value and paid a capital stock tax, the Board denied taxpayer a credit for value of capital stock in the computation of its excess profits tax (R. 35).

Twenty-eight days after the Board promulgated its findings and opinion, taxpayer filed a "Motion for Rehearing, Re-consideration, and Further Hearing", asking for reconsideration of the deci-

sion that taxpayer was an association and, in the alternative, if the Board adhered to that portion of its decision, for a rehearing in order that taxpayer might present evidence upon the alternative issues raised by taxpayer's petition with respect to depletion, depreciation, and valuation of taxpayer's capital stock for excess profits tax purposes, upon which taxpayer had submitted no proof at the trial (R. 35–38). The Board denied this motion May 9, 1940 (R. 35). On October 7, 1940, the Board entered its decision, pursuant to its findings of fact and opinion, in taxpayer's 1933 case (R. 38), and on October 10, 1940, its decision in taxpayer's 1934 case (R. 39).

The taxpayer alleged as error in the Court of Appeals (R. 45–47): (a) The decision of the Board that the taxpayer was an association taxable as a corporation during the years 1933 and 1934; (b) the refusal by the Board to receive in evidence a revenue agent's report on taxpayer for the year 1933;[2] (c) the refusal of the Board to grant a rehearing to permit taxpayer to present evidence upon the alternative issues with respect to depletion, depreciation, and valuation of taxpayer's capital stock for excess profits tax purposes, which taxpayer had raised in its petition to the Board but upon which taxpayer had submitted no evidence at

[2] The report had been excluded because the Commissioner had not accepted the revenue agent's report nor followed it in determining the 1933 deficiency (R. 52; cf. R. 12–14).

the trial; (d) the failure of the Board to grant a rehearing to permit taxpayer to prove that $27,579 of taxpayer's 1933 receipts were not income but a contribution to its capital.[3]

The Court of Appeals affirmed the decision of the Board (R. 78–81). Fifteen days thereafter counsel for taxpayer filed with the Court of Appeals a "Petition for Rehearing and Modification of Opinion and Judgment", representing to the Court of Appeals that slightly more than four months after the Board promulgated its opinion in this case the taxpayer had filed capital stock tax returns for the years ending June 30, 1933, and June 30, 1934, respectively, declaring a capital stock value of $295,000 in its return for the first year and a capital stock value of $400,000 in its return for its second year, and had paid its capital stock tax on the values thus reported. The petition then prayed the Court of Appeals to rehear the case and modify its opinion and judgment so as to remand the case to the Board for the purpose of hearing evidence concerning the values thus declared in taxpayer's belated capital stock returns and concerning the capital stock taxes paid pursuant to such returns, and for a redetermination accordingly of taxpayer's excess profits taxes for the calendar years 1933 and 1934 (R. 82–84). The

[3] By its assignment of error No. 5 in the Court of Appeals (R. 45) taxpayer for the first time in this case asserted that $27,579.21 of its 1933 receipts were a contribution to its capital and not income.

Court of Appeals denied taxpayer's petition on April 16, 1942 (R. 84).

ARGUMENT

The Court of Appeals correctly affirmed the decision of the Board. Since all but one of the questions presented here are substantially identical with questions presented in the companion case, *Second Carey Trust* v. *Helvering,* No. 135, October Term, 1942, the Court is respectfully referred to the Government's brief in opposition in that case for a discussion of the issues common to the two cases.

The one question raised here which is not raised in *Second Carey Trust* v. *Helvering* is whether the Court of Appeals committed reversible error in denying taxpayer's petition for rehearing and modification of the court's opinion and judgment. In view of the circumstances, the court properly denied the petition. Cf. *General Utilities Co.* v. *Helvering,* 296 U. S. 200, 206–207; *Bankers Pocahontas Coal Co.* v. *Burnet,* 287 U. S. 308, 312–313, and other cases cited therewith in the Government's brief in opposition in the *Second Carey Trust* case, *supra,* pp. 15–16. *Del Mar Addition* v. *Commissioner,* 113 F. (2d) 410 (C. C. A. 5), is not authority for the taxpayer's view that the Court of Appeals in this case should have granted the petition for rehearing since the capital stock tax return in the *Del Mar* case was filed *before* the trial of that taxpayer's income and excess profits tax case before the Board, and the filing of the return

and its contents were there proved to the Board. Here, on the other hand, petitioner sought to inject into the case events which occurred after the Board's final decision.

CONCLUSION

The decision of the Court of Appeals is in accord with the applicable decisions of this Court, and no conflict of decisions is presented. It is therefore respectfully submitted that the petition should be denied.

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